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Supreme Court of the United States

October Term, 1939.

No. 719

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF APPELLANT ON JURISDICTIONAL QUESTION.

WALTER W. BLOOD,
FRANK N. BANCROFT,
of Denver, Colorado,
Counsel for Appellant.

CLARK QUICK PRINTING CO., LAWRENCE 1332-34, DENVER, COLO.

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vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF.

The appellee, in his statement against jurisdiction, has brought in matters new to the appellant's statement as to jurisdiction, and such as appellant could not have anticipated. The appellee's said statement is tantamount to a motion to dismiss and a brief thereon. Inasmuch as he has not filed (and we are informed will not file) either a formal motion to dismiss, or any brief other than his argument in his said statement, and other than his brief upon the merits, we beg leave to file this brief upon the jurisdictional question, and request that the court consider it when determining whether or not to note probable jurisdiction. It may, and, we believe, should, be treated as preliminary to any consideration of the merits; and

it is not our purpose to foreclose the appellee from further arguing or presenting, in his brief upon the merits, or at any argument or hearing of this cause, all matters which he may deem appropriate upon the jurisdictional question. The appellant therefore respectfully moves that, treating the appellee's statement against jurisdiction as a motion to dismiss and brief thereon, the appellant be granted permission to file this, its brief, in opposition thereto.

BRIEF IN SUPPORT OF JURISDICTION.

Preliminary Statement.

For a general understanding of this cause, we respectfully refer the court to our statement as to jurisdiction and to the exhibits attached thereto, some of which we refer to in this argument. The said statement should also be considered as a statement of the case, and as made in this motion to dismiss, and this brief as an argument thereon.

The appellee makes four points:

1. That the statement of the appellant as to jurisdiction does not specify the stage in the proceedings in the court of first instance at which and the manner in which the federal questions sought to be reviewed were raised, as required by Rule 12 of the rules of this court;

2. That the question of jurisdiction has been decided against appellant so as to be res judicata;

3. That the appellant is bound by the Colorado Supreme Court's ruling that its safe-deposit business is not a part of its banking business; and,

4. That there is no substantial federal question.

We answer these in their stated order; but combine the first and second under our first heading and the second and fourth under our second heading.

I.

As to the Proceedings on Removal.

It is true that, within the time required to appear, and when only the Treasurer's petition was on file in the Denver District Court, the bank filed a petition to remove the cause to the District Court of the United States for the District

of Colorado; that the cause went over under the applicable procedure; and that, upon the motion of the Treasurer, it was remanded. The order of remand is in the form customary in Colorado and does not contain any of the findings or conclusions upon which it was based.

The Acts of Congress and the decisions thereon require that certain grounds for removal must appear upon the face of the pleadings filed in the state court—in this cause, the Treasurer's bill of complaint, designated a "petition." (The original petition is not in the record in this court. An amended petition was subsequently filed and is in this record.) One of the jurisdictional requirements for removal is that the amount or value of the thing in controversy shall exceed $3,000, exclusive of interest and costs. (See Judicial Code, Sec. 24, Subd. (1) and Sec. 28; U. S. C. A., Title 28, Sec. 41, Subd. (1) and Sec. 71.) We feel that citations as to this are not needed.

The granting of the Treasurer's motion to remand, upon considering only the Treasurer's said petition, was not a determination that a federal question was not involved, as said pleading did not show (and no showing could then be made) that the amount then accrued and unpaid on the demanded service tax asserted against the bank's safe-deposit business, exceeded $3,000. (See Henneford v. Northern Pacific Ry. Co., 303 U. S. 17, 58 Sup. Ct. 415.) There is, however, no jurisdictional requirement as to the amount upon appeal to this court, as there is upon removals to, and upon commencing suits in, a federal district court. It therefore often happens that cases which can neither be removed from a state court to a federal court, nor commenced in a federal court, may be appealed from the highest court of a state to this court. This is such a case.

We do not mean, by the foregoing, to minimize the importance of this suit. The amount of the tax involved, is, of course, now far in excess of the demanded and

unpaid tax when the Treasurer filed his petition in the state district court on September 7, 1937; and, furthermore, the declaratory judgment and decree, affirmed by the Colorado Supreme Court, unless reversed, establishes liability of the bank to forever pay the tax in the future, so long as the Service Tax Act is in force and effect; and its duration is unlimited.

Neither did the Treasurer's petition show the facts first alleged in the bank's answer from which it follows, as a matter of law, that its safe-deposit business is a necessary and integral part of its banking business under its federal charter.

Though it was intimated in the Treasurer's petition that the bank would raise federal questions (he undoubtedly expected them), the first pleading of the facts raising the federal questions, now asserted, was the bank's answer, filed in the state district court after the remand. Then, and not until then, were they actually raised. But ever since then they have been vigorously presented.

We believe that in part III of our statement as to jurisdiction, we have literally complied, and we know that we have in good faith attempted to fully comply, with Rule 12, and to specify the stage in the proceedings in the court of first instance, and the manner in which the federal questions, sought to be reviewed, were raised. The court of first instance was the state district court, and the first stage of the proceedings in that court was the filing of the answer. In our statement as to jurisdiction we quote parts, and summarize the other parts of said pleadings, and of the subsequent pleadings, and of all pertinent orders entered thereon, and of everything material leading up to and including the final judgment and decree affirmed by the Colorado Supreme Court, from which we have appealed. If anything is omitted it is inconsequential and not material to the errors assigned;

and we believe that more than a sufficient showing is made to convince this court that the federal questions were raised when they first could have been raised by the bank's answer, that the state courts, both district and supreme, had the said questions presented to them, and considered and determined them.

Furthermore, as shown by the record herein, there has been no delay. The final decision of the Colorado Supreme Court was rendered on January 8, 1940, and the appeal was filed in the Colorado Supreme Court, and allowed on January 17, 1940. This shows a diligent desire of the appellant to have its rights reviewed and determined by this court, and is an additional reason why it should not, so to speak, be "thrown out of court" because of any inadvertence or oversight of its counsel.

No mention was made, in appellant's said statement, of the proceedings on removal, and they were not included in appellant's praecipe, indicating the parts of the record to be certified, because appellant did not assign the remand as error. We believed, and now believe, that they are not material to this appeal. After the remand, and the filing of the bank's answer in the state district court, the Treasurer demurred, and the parties stipulated to stand on their said pleadings. The stipulation is summarized in appellant's said statement, and is included in the printed record in this court. The purpose of the stipulation was to expedite the final determination of this cause upon its merits.

In our opinion, it would have been a breach of faith, and it would have violated the spirit of the said stipulation, to have assigned the remand as error. So far as the United States District Court was concerned, as is well known, no appeal could have been taken from the remand order. We know of no reason, and none has been called to our attention, why the bank could not, after the

remand, acquiesce in it, and defend the cause upon its merits. That is what it did. It seems to us that the Treasurer should not now contend that the bank should have relied further upon a matter of procedure.

For the reasons above stated we submit that the appellee's first and second reasons, assigned in his statement opposing jurisdiction, are wholly insufficient for a dismissal of the appeal.

II.

The case draws in question the United States Constitution and laws, and the Colorado Court decided substantial federal questions arising under the Colorado Service Tax Act.

The appellee's statement, that the validity of the Colorado Service Tax Act is not in question, is contradicted by the pleadings and other matters of record in this cause. In paragraph numbered VIII of his verified amended petition, he alleges:

> "The nature of the controversy (between him and the bank) is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws, *and hence invalid as to banks.*" (Italics are ours.)

The bank in paragraph numbered 5 of its answer admitted this allegation, and thereafter alleged, in detail, the facts showing why the act is invalid as against the bank unless it should be held that the state is prohibited under the Constitution and laws of the United States from taxing any of the bank's services. The district court, on June 8, 1938, rendering a written opinion, by its first decree held that the said prohibition applies. This, the Colorado Supreme Court at first affirmed without written opinion, the participating judges being divided three to three. All of these matters appear in appellant's statement as to juris-

diction, as well as in the record. The Treasurer petitioned for a rehearing, and we quote from his said petition on file in the Colorado Supreme Court, the following:

> "The primary purpose of this action was to obtain a judicial interpretation of the meaning of certain provisions in the Public Revenue Service Tax Act of 1937. Specifically, the interpretation sought was, whether or not the burden of the tax imposed by the act is upon the one performing the service or upon the consumer or user of the service, *and whether or not the duty of collecting such service tax imposes upon an agency of the United States Government an unconstitutional burden.* The equally divided opinion of this court, without written opinion, leaves us without any clear and adequate judicial interpretation of the questions raised.
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> "If the service tax is judicially held to be imposed upon the consumer or user of the service, as above indicated, then the other sole remaining question would be whether or not the duty of collecting and remitting the tax would be an unconstitutional burden upon the national bank. *Such a question would be one subject to review by the United States Supreme Court, and for such purposes a clear and concise opinion of this court should be given.*" (Italics are ours.)

The rehearing was granted, and thereafter the Colorado Supreme Court reversed the first decree by a four to two decision, one of the three justices who had been for affirmance not then participating. This opinion is attached as an exhibit to the appellant's said statement and is also in the record herein, and is reported as *Bedford, Treasurer, v. Colorado National Bank*, 104 Colo. 311, 91 Pac. (2d) 469, and holds that the state is not prohibited by the United States Constitution and laws from taxing the

bank's safe-deposit services and that, as to burdens imposed, the act is valid against the bank. These are federal questions. It is true that the Colorado Supreme Court also held that the safe-deposit business of the appellant national bank is not part of its banking business. This also is a federal question, and depends upon the proper construction and application of the National Banking Act, which defines the charter powers and business of the appellant. The state supreme court also held, in its said opinion, that the appellant national bank is not the taxpayer under the service tax act "unless it refuses to comply with certain terms of the act." And this raises the federal question as to whether a state may tax a national bank contrary to R. S., Sec. 5219, as amended, if the bank does not do what the state demands.

All of these questions have been inherently present in the case and considered from its inception. The pleadings, the two decrees, and written opinion of the state district court, and the three decisions of the state supreme court are attached as exhibits to appellant's said statement, and are also in the record in this cause. Of the one judge and seven justices who have heard this case in the state courts upon these federal questions, four have upheld the bank's claim of federal immunity, and four have denied it. Questions first decided one way by a state district court and first affirmed by a state supreme court, though later reversed, must be substantial, and we submit, being federal questions, are entitled to further argument in this honorable court. This is especially true because this court's decision upon them will affect every national bank having a safe-deposit department in Colorado, and unless this court, as the court of last resort, decides them in this suit, other national banks, who are not parties to this cause and are not bound by the state court judgment, will not be foreclosed from litigating these same questions in the federal courts.

We expect to contend, upon the merits, within our assignments of error (1) that under the Acts of Congress the safe-deposit business of the appellant national bank is a part of its banking business (2), that the service tax act is a burden, and the tax thereunder is a burden, on appellant's banking business, even if the tax be payable or paid by the user of such services, and (3) that the state is prohibited from taxing the bank or its business, it is immune from such taxation, and unless such immunity be recognized, *the act is invalid as to it.* We have so contended in the state courts; and we have thus relied and still rely upon federal immunity. The following cases hold that this court has jurisdiction when such an immunity is in good faith asserted, even though the immunity may be denied by this court, and also that such jurisdiction prevails when invalidity may occur if the act be applied to a federal agency or instrumentality, but may not occur if not so applied:

Clallam v. U. S., 263 U. S. 341, 44 S. Ct. 121.
Logan, etc. Bk. v. Townsend, 139 U. S. 67, 11 S. Ct. 496.
Calif., etc. Bk. v. Kennedy, 167 U. S. 362, 17 S. Ct. 831.
Weston v. Charleston, 2 Pet. 449.

There are many other like decisions. In addition, we might cite the numerous cases brought to this court upon appeal (formerly writ of error) holding unconstitutional state statutes burdening or taxing federal agencies and instrumentalities, as does the Colorado Service Tax Act, unless the state statutes are not so applied. Some of them are cited in our statement as to jurisdiction. We expect to cite many of them in our brief on the merits; but do not cite them now because we believe that argument on the merits should be withheld until the appropriate time.

To sustain this court's jurisdiction, we rely also on *Gully v. First National Bk.*, 299 U. S. 109, 57 S. Ct. 96,

cited by the appellee. Though the court held in that case that jurisdiction was lacking, in the first part of the opinion the court comprehensively reviews the essentials of jurisdiction, and prescribes certain tests or guides. The cause at bar meets all of them. Note the following: "The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

As an example of the applicability of that test to this cause, we present this: That if the Banking Act be construed as authorizing national banks to operate safe-deposit departments, then that business is a part of their nationally chartered banking business and franchises; and if the Constitution and Acts of Congress, and particularly R. S., Sec. 5219, as amended, prohibit states from taxing national banks or their property, business or franchises, except as in that section provided, then the immunity from the service tax act for which the appellant national bank contends, will be supported. The cited case did not hold that jurisdiction is lacking in such a cause as this. It held, instead, that in that particular case the question was whether it was removable because it appeared from the complaint, only, that a national bank had, by contract, assumed and agreed to pay the taxes of another national bank, when, from all that appeared, the failure of the defendant national bank to perform its contract may have been for any number of reasons not involving any federal question.

We do not consider *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, cited by appellee, as controlling, because the immunity asserted in that case was only *implied*. In this cause it is an *expressed* immunity. *Federal Land Bk. v. Crosland*, 261 U. S. 374, 43 S. Ct. 385, and *Pitman, Clerk, v. H. O. L. C.*, 60 S. Ct. 15, are more in point. They involved, as does this cause, *congressional grants of immunity*.

Therefore, as to the last two points assigned by appellee in opposing jurisdiction, we respectfully submit that several federal questions are necessarily inherent in this litigation and that they are so substantial that the state district court and state supreme court were compelled to and did decide them, and further, that their determination by this court should be had for the benefit of the appellant national bank and for the final settlement of these questions affecting all other national banks in Colorado operating safe-deposit departments.

Respectfully submitted,

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.